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No. 83

In the Supreme Court of the United States

OCTOBER TERM, 1930

PARAMOUNT FAMOUS LASKY CORPORATION ET AL.,
APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 158) is reported in 34 F. (2d) 984.

JURISDICTION

The judgment of the District Court was entered on January 21, 1930. (R. 170.) Petition for appeal was filed March 21, 1930 (R. 175), and was allowed on the same day (R. 176).

Jurisdiction of the Court is conferred by Section 2 of the Act of February 11, 1903, c. 544, 32 Stat.

823 (U. S. C., Title 15, Sec. 29), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345). *United States* v. *International Harvester Co.*, 274 U. S. 693.

QUESTIONS PRESENTED

(1) Whether the agreement of appellant distributors to impose upon every exhibitor of motion picture films compulsory arbitration of all disputes arising under the Standard Exhibition Contract and collective enforcement by the distributors of arbitration and arbitration awards constitutes a conspiracy in unlawful restraint of interstate commerce.

(2) Whether the arbitration provisions of the Standard Exhibition Contract and the manner in which they had been enforced are fair and just to exhibitors.

(3) Whether a majority of the exhibitors whose theatres are not owned or controlled by distributors or producers disapprove the arbitration provisions of the Standard Exhibition Contract.

STATUTE INVOLVED

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., Title 15, Secs. 1 and 4), known as the Sherman Antitrust Act, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is

hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * *

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

STATEMENT

This is a suit in equity under Section 4 of the Sherman Antitrust Act charging that appellees are engaged in a conspiracy in restraint of inter-

state commerce in motion picture films in violation of Section 1 of that Act. (R. 12.) Appellants (defendants below) are ten leading corporations engaged in the distribution of motion picture films for exhibition throughout the United States, thirty-two Film Boards of Trade (hereinafter sometimes referred to as "Film Boards") located in the thirty-two cities of the United States which are the chief centers of distribution of motion pictures and with a membership consisting of the local exchange managers of distributors of motion pictures, the officers and members of such Film Boards, and the Motion Picture Producers and Distributors of America, Inc., a membership corporation, of which appellant distributors are members. (R. 1–11.)

The petition charges that appellant distributors, pursuant to an unlawful conspiracy in restraint of interstate commerce, have agreed with each other to coerce and require every exhibitor of motion pictures to submit to arbitration all disputes arising under any contract licensing the exhibition of motion pictures and to comply with any award rendered against him in any such arbitration proceeding, without appeal to the courts; and that, pursuant to this agreement, appellant distributors have adopted and have used exclusively certain successive uniform contracts for the exhibition of motion pictures containing provisions for the determination by arbitration of all claims and controversies arising thereunder, and have adopted and collec-

tively enforced rules governing the procedure and practice to be followed in the arbitration of such controversies, and in the enforcement of arbitration awards. (R. 25–33.) The petition also charges that the members of appellant Film Boards have, without the knowledge and against the general instructions of appellant distributors, entered into supplemental understandings and agreements with each other to refuse to contract for the future exhibition of any motion-picture films with any exhibitor who has failed to comply with any arbitration award, and that these supplemental understandings and agreements have had as their object the carrying out of the principal conspiracy charged. (R. 33–35.)

Appellants' answer admits that appellant distributors have adopted and agreed to use, and have used substantially exclusively, the successive uniform exhibition contracts attached to the petition as Exhibits A (R. 36), B (R. 46), and C (R. 60), and that they have caused each Film Board to adopt the successive arbitration rules attached to the petition as Exhibits D (R. 80), E (R. 89), F (R. 96), and G (R. 104). (R. 117–119.)

Films produced in the laboratories of the appellant distributors are shipped from these laboratories and distributed, through the medium of film exchanges maintained by the distributors in the cities where the Film Boards are located, to exhibitors in States other than the State of the

producing laboratory. (R. 22–25.) Appellants' answer admits they are engaged in interstate commerce. (R. 116.) See *Binderup* v. *Pathe Exchange,* 263 U. S. 291.

Appellant distributors distribute approximately 60 per cent of the motion picture films exhibited in the United States and the members of the various Film Boards distribute approximately 98 per cent of the films exhibited in the United States. It is therefore impossible for any motion picture theatre to secure sufficient films for its regular operation without dealing with one or more members of the Film Board in the territory in which the theatre is located. (R. 14, 115.) In contrast with such control of distribution by appellants and the other distributors associated with them in the Film Boards, there were in 1927 some 20,000 unaffiliated exhibitors, that is, exhibitors whose theatres are not owned or controlled by distributors or producers, and these exhibitors were so far unorganized that they could not be adequately represented by any existing organization or organizations. (R. 558.)

It is the practice of each distributor to announce in the spring of the year a program of motion pictures for a distribution period of twelve months, to commence the following fall. (R. 17–18, 116.) Upon the announcement of the annual programs of pictures, exhibitors contract for the number of pictures which they will require for an extended time in the future, generally for a period of one

year. (R. 19, 116.) Pictures are produced throughout the period of distribution (R. 18, 116), so that exhibitors in most cases are compelled to contract for pictures which have not yet been produced. Since no distributor in the course of a year distributes sufficient feature pictures to supply the average exhibitor's program, the average exhibitor deals with from five to fifteen distributors and signs from twenty-five to fifty contracts annually, while many exhibitors sign more than fifty contracts in the course of a year. (R. 124–125.) The average exhibitor therefore makes each year several separate contracts with each of the distributors with whom he deals.

An exhibitor who requires an individual motion picture for a date in the immediate future for which no pictures included in his contracts are available or who needs a picture to complete his program may contract for any film which is available for immediate exhibition. This is known in the trade as "spot booking." (R. 20, 116.) Contracts with exhibitors are solicited by the distributors' exchange managers and their salesmen, but they are in all cases subject to acceptance by the home office. (R. 15, 115.)

Motion picture theatres in the United States are classified as "first run" or "subsequent run" houses, depending upon whether each theatre first exhibits motion pictures in the city in which it is located, or whether it exhibits motion pictures after they have been shown one or more times in the same

city. (R. 13–14, 115.) A first-run theatre may pay a rental of $5,000 for the exhibition of a picture for which a subsequent-run theatre will pay as low as $7.50. (R. 313.) About seventy-five per cent of the first-run houses are operated by ten or twelve national or regional chain operators and a majority of the first-run houses are affiliated with producers or distributors. (R. 315.) Approximately fifty per cent of the total receipts derived by distributors as rentals for films is obtained from first-run theatres. (R. 14, 115.)

Prior to 1922 the contracts of the various distributors contained many widely differing provisions, and much confusion resulted, particularly in connection with the selection of play dates under varying contracts with different distributors. (R. 125, 198.) The court below described the evolution of the successive uniform exhibition contracts (attached to the petition as Exhibits A, B, and C), which the distributors have used since April, 1923, up to the time of the trial of this case, as follows (R. 161):

> Shortly after the organization of the Motion Picture Producers & Distributors of America, Inc., which included in its membership all of the defendant distributors, negotiations were instituted between the defendant distributors and various exhibitors in an effort to agree upon a uniform exhibition contract, and since that time there has been in progress in this industry between the motion picture distributors and exhibitors a

> continuous process of collective bargaining with reference to the provisions of the uniform contract. The distributors, being comparatively few in number, were compactly organized and thoroughly represented in these negotiations. The thousands of individual theatre owners scattered throughout the United States were not thus completely organized, and many of them were not represented in these negotiations, although it must, in fairness, be said that in so far as the exhibitors were organized they were represented through representatives selected by their organizations.

The form of contract now used by the distributors is the Standard Exhibition Contract, dated May 1, 1928 (sometimes herein referred to as the "Standard Exhibition Contract"). The Eighteenth Article of this contract (R. 71–73) contains the provisions relating to compulsory arbitration. It is the Government's contention that the distributors forced these arbitration provisions upon the exhibitors. The Government further contends (*infra*, pp. 50–54) that in so far as the exhibitors were represented in the negotiations leading up to the adoption of the Standard Exhibition Contract, the distributors adopted the arbitration provisions thereof in complete disregard of the expressed views and wishes of such representatives of the exhibitors.

The substance of the provisions of the Standard Exhibition Contract relating to arbitration is that

each party, both the distributor and the exhibitor, agrees to submit any controversy under the contract to a board of arbitration (established pursuant to certain rules of arbitration dated May 1, 1928, incorporated by reference in the contract) in the city where the distributor's exchange is located. Each party agrees to abide by the award, and each party waives the right to a jury trial on any issue arising under the contract and agrees to accept as conclusive the findings of fact made by the board of arbitration. If an exhibitor fails or refuses to submit to arbitration any controversy arising "under this *or any other Standard Exhibition Contract* which the Exhibitor may have with the Distributor *or any other distributor*" (italics ours), the distributor can require security up to $500 under each existing contract to be retained by the distributor until all his contracts have been completed. The right to demand the same security also arises if an exhibitor does not forthwith comply with an award "upon any such claim or controversy" submitted to the board of arbitration.

Under these provisions, therefore, if an exhibitor fails or refuses to arbitrate or to carry out an award, not only the particular distributor involved, but all other distributors with whom the exhibitor has a Standard Exhibition Contract, can demand security on each contract with the exhibitor. The effect on a recalcitrant exhibitor of such a concerted

demand for security is thus stated in the opinion of the District Court (R. 165):

> In view of the exhibitor's necessity to contract in advance with several distributors for the delivery of films to be exhibited in accordance with a program laid out for more than a year in advance, it will at once be seen that the exhibitor's refusal to arbitrate will immediately subject him to heavy demands for security, which if not complied with will result in the termination of his entire supply of films for exhibition in his theatre, and probably result in conditions under which he can not continue in business.

The rules of arbitration (R. 104–113) referred to in the Standard Exhibition Contract and adopted by each Film Board provide for a board of arbitration consisting of three members of the Film Board acting as representatives of the distributors and three exhibitor representatives. The former are appointed by the Film Board, the latter by the local exhibitors' association, if any, otherwise by the president of the chamber of commerce in the city where the Film Board is located or by the mayor or chief executive of such city. In case of a tie vote, provision is made for the appointment of a disinterested seventh arbitrator if a majority of the board are unable to agree upon a seventh arbitrator. (Rule I.)

The board of arbitration in determining any controversy submitted to it shall fix the maximum

amount (not exceeding $500) which each distributor may demand in the event of the failure of the exhibitor to submit to arbitration or to comply with the award. (Rule II.)

If the respondent does not appear at the hearing fixed by the board it may enter an award after hearing the complainant's case. It may, in its discretion, open such an award upon written application made within seven days of the award. (Rule III.)

The secretary of the board of arbitration shall notify the local Film Board of (a) the name and address of each exhibitor found to have refused to arbitrate or to comply with an award and (b) the maximum amount of security which the arbitration board has fixed. All members of the Film Board, in other words, practically all the distributors with whom the exhibitor has contracted, are immediately given this same information by the secretary of the Film Board. Thereupon each member of the Film Board having a contract with any such exhibitor "shall demand payment" of such security (not exceeding the maximum fixed by the arbitration board) as the distributor believes sufficient to protect all his contracts with the exhibitor. There is the further limitation on the maximum security which may be demanded, that it shall not exceed the value of films thereafter to be delivered plus the rental contracted to be paid therefor. If the security demanded is not paid within seven days, service shall be suspended until the exhibitor has

furnished the required security or has complied with the decision of the arbitration board. Each distributor may cancel any contract after service thereon has been so suspended for ten days. (Rule IV.)

The enforcement provisions of the Standard Exhibition Contract relating to distributors provide that if a distributor refuses to submit to arbitration or to comply with an award only the particular exhibitor in whose favor the award runs may terminate his contracts with the distributor and, during the period of noncompliance, the distributor can not avail himself of the arbitration provisions of the Standard Exhibition Contract. (R. 72–73.)

The attitude of the distributors towards any truly reciprocal enforcement provisions is indicated by the following extract from a report (R. 1891) of conferences with Will H. Hays, president of appellant Motion Picture Producers and Distributors of America, Inc., relative to a uniform contract, which report was submitted by the board of directors of the Motion Picture Theatre Owners of America to that organization at its annual convention in May, 1923, and unanimously adopted (R. 1897–1898):

> Our contention was that if a cash penalty was to be assessed against the exhibitor for breach, that a similar cash penalty should be assessed against the distributor who should breach. This proposal was rejected by the representative of the distributor. We then suggested to Mr. Hays that this clause be changed to read that all of the exhibitors in

> that zone should have the right, at their option, to cancel all existing contracts with the offending distributor, but Mr. Ludvigh, of Famous Players-Lasky Corporation, strenuously opposed the suggestion, and said they would not consider such a clause under any conditions.

When an exhibitor had failed to comply with an arbitration award made on a contract with one distributor, all other distributors were *required* by the rules of arbitration, as those rules were interpreted by the distributors, to demand security on each of their contracts. Thus, the secretary of a Film Board wrote Mr. Hess, general attorney of these Boards and of Motion Picture Producers and Distributors of America, Inc. (R. 199), that United Artists Corporation had recovered an award which the exhibitor was carrying out by playing certain pictures, and United Artists, following an award obtained by another distributor against the same exhibitor, was very reluctant to require security on its contract. (R. 1275–1276.) Mr. Hess replied (R. 1274–1275):

> The fact that the exhibitor is carrying out his contract with the United Artists because of the award directing him to do so does not relieve the United Artists of its obligation, under the Rules and Regulations Relating to Arbitration, from demanding security for the performance of such contract, because of the exhibitor's failure to comply with the award in favor of another distributor.

If an exhibitor who had not complied with an arbitration award put up the required security on contracts of other distributors and thereby kept them alive, it was nevertheless the policy of appellant distributors to hold the exhibitor to the strict letter of these contracts so as, if possible, to bring him "back into line." (R. 983–986.) The exchange manager of one of appellants, in a letter addressed to all members of the local Film Board, wrote with reference to such a situation (R. 987–988):

> This exhibitor has put up the required deposit with several of the companies and is now operating, and the other companies, with which he has put up no deposit, are holding the bag.
>
> It is not the object of the Joint Board of Arbitration or the Film Board of Trade as a whole to allow a theatre to operate under a deposit; the object is to have the exhibitor fulfill his obligations with each organization that he is dealing with.
>
> Therefore, the only way to bring this matter to a head is by passing this award and asking for an additional deposit until such a time as this exhibitor can not put up any more deposits.

The demand for security which the arbitration rules required each distributor to make had no relation to any credit risk. Mr. Hess advised the secretary of a Film Board (R. 1241–1242) that notwithstanding that payment in advance was offered

by an exhibitor who had not complied with an award—

> the distributor is obligated under the Arbitration Rules to require that the amount of security fixed by such Rules for the performance of contracts existing at the date of the award be deposited.

Exhibitors bitterly complained of one feature of arbitration which arose outside the contract provisions and the arbitration rules themselves. This was that the distributor members of arbitration boards were not permitted to act independently due to (1) the fear of criticism by their fellow members, and (2) dictation from the distributors' central office in New York. In October, 1926, as the result of a conference of representatives of exhibitors of the States of Illinois, Indiana, Michigan, Minnesota, North Dakota, South Dakota, Ohio, Texas, and Wisconsin, a letter was written to the president of appellant Motion Picture Producers and Distributors of America, Inc., stating that the purpose of the conference was to consider the fact that arbitration in each of these States, as well as in other film centers, had not been working satisfactorily. The letter said that this was largely due to various communications emanating from the New York office practically "instructing distributor members on Arbitration Boards as to how they should act, how they should decide, and what they could and could not do in the consideration of cases

that came before them." (R. 1861.) The letter further said (R. 1862):

> We feel also that it is very necessary that distributor members of Arbitration boards should be free from all criticism from your office, their superiors or fellow members covering any decision which their conscience and good judgment may dictate.
>
> With three members of each board paid employees of a few closely knit distributing companies whose problems are identical you will readily understand that it is very difficult even under the best of conditions for them to give an unbiased decision. Such a decision becomes impossible when pressure or criticism is brought to bear upon them from their own ranks.

A footnote on page 78 of appellants' brief states that the practices complained of in this letter were criticisms by high officers in distributor organizations of the distributor members of boards of arbitration on account of their decisions and that the addressee of the letter took immediate steps to stop the practice. We submit that this is a very incomplete statement of the practices objected to by the exhibitors and that the objectionable practices did not cease. Mr. Hess thereafter wrote many letters advising the secretaries and distributor members of arbitration boards and the secretaries of Film Boards how the arbitration rules and contract provisions should be interpreted and even what dis-

position should be made of specific arbitration claims. With respect to the influencing of the distributor representatives on boards of arbitration by their fellow members of Film Boards, this could not be effectively controlled from the New York office, even assuming that any attempt at such control was ever made.

The following are typical examples of the advice and instruction given by Mr. Hess, both before and after October, 1926, relative to arbitration proceedings or awards:

(1) In February, 1926, the secretary of a Film Board wrote Mr. Hess that the local arbitration board would not consider certain claims resulting from short remittances, express charges, returned checks, etc., on the ground that the board was "no collection agency," but that new distributor members of the board, desiring to convince the exhibitors that collection is part of the work of the board, "are turning to you for advice." (R. 1247.) In reply Mr. Hess advised that it was the duty of the board to consider such claims. (R. 1248.)

(2) In April, 1926, the secretary of a Film Board wrote Mr. Hess' office that the local arbitration board had *unanimously* passed a rule to consider no claims on contracts made more than two years and a half prior to the filing of the claim, that there had previously been instances when an award called for pictures which were no longer available, and instances where there was no correspondence or records of any kind attached to guide the board.

(R. 1251.) Mr. Hess replied that the ruling in question "must be rescinded," thus indicating that he considered that his views would control the action of the board. (R. 1252–1253.)

(3) In October, 1928, Mr. Hess sent a letter to the secretaries of all boards of arbitration in which he criticised certain types of awards, indicated how they should properly be made, and enclosed forms of awards which he recommended be adopted by each board. (R. 1268–1270.)

(4) In March, 1927, Mr. Hess in a letter to the secretary of a Film Board criticising an arbitration award (R. 1272), said (R. 1274):

> So that the members of the Board of Arbitration may not err in the future, I suggest that you read this letter to them.

(5) In March, 1927, Mr. Hess sent a letter to the secretaries of all Film Boards stating that a Copyright Protection Bureau had been established in his office at the suggestion and with the approval of all national distributors and said (R. 1288):

> The Boards of Arbitration, in making awards in "bicycling cases" will be urged to adopt as the basis for every award the amount specified in the United States Copyright Law, a minimum of $250, a maximum of $5,000.

(6) In July, 1928, the secretary of an arbitration board wrote Mr. Hess that at the hearing on a certain case the arbitration board requested that he be written for an opinion. After receipt of Mr.

Hess' reply the secretary again wrote Mr. Hess that the board, after reading and discussing his letter, had again postponed final decision and had instructed that he be written again with reference to the case. (R. 1481–1485.)

(7) In August, 1928, the secretary of a Film Board wrote Mr. Hess' office in a "bicycling" case, i. e., an unauthorized showing of films, asking "what amount I should ask the Board of Arbitration to award in this case." (R. 1522–1523.) Mr. Hess replied advising damages of $1,750, which the board proceeded to award, although the film rental on the pictures actually "bicycled" did not exceed $57.50. (R. 1526–1527.)

At the trial the Government offered in evidence certain documentary evidence obtained from the files of twenty-seven Film Boards (Gov. Exs. 9–35) and from the files of the home office of the Film Boards (Gov. Exs. 35–36–D) and certain other documentary evidence (Gov. Exs. 37–49). It also called as witnesses four exhibitors who had participated in the conferences with distributors leading up to the adoption of one or more of the three uniform exhibition contracts adopted by the distributors. (R. 452, 466, 473, 475–476.) Appellants introduced certain documentary evidence and called as witnesses the secretaries of several Film Boards and certain counsel or officials of appellant distributors.

The District Court found that appellants were enforcing a system of compulsory arbitration by

means of an agreement between themselves not to trade except upon terms which they fixed in advance; that involuntary restraint was thereby imposed upon the freedom of exhibitors to engage in trade under natural and normal conditions; and that such coercive restraint upon the commercial freedom of an exhibitor who was neither represented nor consulted with reference to the adoption of the Standard Exhibition Contract was undue and unreasonable, both at common law and under the Sherman Act. (R. 168–169.) The District Court also found that there was abundant evidence that the members of many Film Boards had until quite recently entered into supplemental agreements and understandings not to contract for the future showing of films with exhibitors who were in default on an arbitration award; and that when these members were advised that such action was not authorized by the rules of arbitration, they were told that it had been the distributors' consistent policy not to deal with exhibitors who failed to arbitrate or to comply with an arbitration award, although the question whether to deal or not to deal with such an exhibitor was one for the decision of individual distributors. (R. 165–166.)

The District Court entered a decree permanently enjoining appellants from further engaging in the conspiracy adjudged unlawful and retaining jurisdiction for the purpose of enforcing the decree and for the purpose of enabling any party to apply to

the court for modification of the decree. (R. 170–175.)

Appellants in their brief filed in this Court do not seem to contend that, assuming the court below was correct in its conclusions of law and fact, the relief given by the decree was improper or inappropriate. Appellants also deem the decree unobjectionable to the extent that its injunctive provisions include relief against the supplemental agreements charged in the petition.[1]

SUMMARY OF ARGUMENT

I. The distributors of motion-picture films, who together control the business of distribution, have agreed not to contract with any exhibitor for the future exhibition of films unless the exhibitor accepts the arbitration provisions of the Standard Exhibition Contract. These provisions require the exhibitor to submit all claims or controversies arising under that contract to arbitration according to the rules of arbitration incorporated therein. These provisions and rules further permit and require enforcement of arbitration and arbitration awards by a simultaneous demand, by every distributor having a contract with an exhibitor who has not complied with an arbitration award on any contract with a distributor, for payment of security

[1] Appellants' brief (p. 82) refers in this connection only to paragraph II, 6 of the decree. We submit that paragraph II, 9 of the decree (R. 173) also applies to the supplemental agreements.

on every existing contract and, if the required security is not paid, for suspension of service on his contracts. The distributors also may cancel any contract upon which service has been so suspended for a period of ten days.

We submit that the foregoing agreement of appellant distributors is an unlawful combination not to deal with exhibitors except upon conditions which unreasonably restrain their commercial freedom. This Court has frequently held that similar combinations not to deal, or to deal only on conditions imposed by the combination, constitute an illegal restraint of trade.

The means adopted by appellants to enforce such arbitration by a concerted demand for the payment of security, to be followed by suspending service on the contract if security is not forthcoming, is also an unreasonable restraint of trade. This Court has indicated that it is illegal for members of a trade group to agree not to extend credit to customers whose accounts with any member of the group are overdue. *Cement Manufacturers Association* v. *United States,* 268 U. S. 588. We submit that the agreement in the instant case has greater elements of illegality than an agreement not to extend credit. The distributors' agreement to demand security has no relation either to the exhibitors' credit standing or to any controversy between the exhibitor and the distributors so acting (except the particular distributor who has obtained an arbitration award).

This Court has held that a State statute imposing compulsory arbitration in trade disputes is in violation of the due process clause of the Constitution. *Wolff Company* v. *Industrial Court*, 262 U. S. 522. It would seem to follow that those who control the available supply of films can not lawfully combine to impose compulsory arbitration upon exhibitors of motion pictures.

II. The arbitration provisions of the Standard Exhibition Contract and the manner in which they have been enforced are unfair and unjust to the exhibitors. All exhibitors outside the State of New York are compelled to arbitrate under the law of a foreign jurisdiction. The situation of distributors in so arbitrating is very different, since they are large companies guided by New York counsel. Distributors can always appear in person before the arbitration boards, which sit in certain central cities where the distributors have exchange managers. Exhibitors, on the other hand, in very many cases can not afford the time or money necessary to travel to these cities to present their arbitration cases in person. The secretary of the arbitration board participates in their deliberations and frequently the secretary of the board is the secretary of the local Film Board, an association of the local exchange managers of the distributors. The distributor representatives on the arbitration boards are chosen by a highly organized group in constant personal contact with each other. There is no comparable organization or personal contact of the ex-

hibitors from whom exhibitor members of the arbitration boards are selected. In addition, the general counsel of the distributors' national organization has influenced the decisions of the arbitration boards by constant interpretation, instruction, and advice to the distributor members of these boards. The records of an arbitration board which were stipulated to be typical of the operations of other arbitration boards show that almost all claims presented by distributors were decided in their favor, although exhibitors were successful in only a little over half of the claims presented by them and also, and perhaps more important, that over ninety-four per cent of the claims on which the board acted were filed by distributors.

III. The history and antecedents of the arbitration provisions of the Standard Exhibition Contract indicate that a great majority of the exhibitors whose theatres are not owned or controlled by distributors or producers disapprove these provisions. The distributors have since 1922 adopted and used three successive uniform contracts containing very similar provisions for compulsory arbitration and enforcement of arbitration awards. The arbitration provisions of the first of these contracts were denounced by the exhibitors' national organization. The same organization also condemned the second uniform contract which the distributors adopted in 1926. The exhibitor members on the contract committee which negotiated with distributors with reference to the Standard Exhibi-

tion Contract which the distributors adopted in 1928 strenuously insisted that arbitration should be optional and that it should not be enforced by collective action. When the distributors completely blocked these proposals the exhibitor representatives approved the contract on the condition that a plan be worked out to finance exhibitor associations so that, in carrying out the arbitration provisions of the contract, the exhibitors should be on something like a parity with the highly organized distributors. Up to the time of the trial of this case no arrangement had been made to provide this financing.

ARGUMENT

I

THE AGREEMENT OF APPELLANT DISTRIBUTORS TO CONTRACT FOR THE EXHIBITION OF MOTION-PICTURE FILMS ONLY ON THE CONDITION THAT EVERY EXHIBITOR ACCEPT THE ARBITRATION PROVISIONS OF THE STANDARD EXHIBITION CONTRACT WHEREBY ARBITRATION AND ARBITRATION AWARDS ARE ENFORCED BY THE COLLECTIVE ACTION OF THESE DISTRIBUTORS CONSTITUTES A CONSPIRACY IN UNLAWFUL RESTRAINT OF INTERSTATE COMMERCE

Appellants in their brief earnestly press upon this Court the benefits alleged to accrue from the use of uniform or standardized contracts and from the commercial arbitration of business or trade disputes. These broad questions, we submit, are largely if not entirely irrelevant to the issues here presented. The only provisions of the Standard Exhibition Contract which the decree in this case

specifically enjoins appellants from using are those relating to arbitration. (R. 171–174.) The decree, moreover, expressly provides that it does not prohibit (1) making any contract, with or without provisions relating to arbitration, provided this is done individually and without combining, conspiring, or agreeing with any other appellant or (2) individually or jointly negotiating and agreeing with any exhibitors on a standard form of exhibition contract, "including reasonable provisions for the arbitration of disputes arising thereunder, if done voluntarily and without coercion, and if applied only to the parties to the negotiations and agreement." (R. 174.)

The principal question in this case is whether the distributors of motion-picture films, who together admittedly control the business of distribution, can legally agree and combine to contract with exhibitors for the future exhibition of films only on the condition that the exhibitor accepts the arbitration provisions of the Standard Exhibition Contract whereby arbitration and arbitration awards are enforced against the exhibitor by the collective action of the distributors.

This Court has condemned as illegal, agreements not to deal except on conditions imposed by the members of an industry. *Eastern States Lumber Association* v. *United States,* 234 U. S. 600, held that the circulation among the members of associations of retailers of lists of wholesalers who dealt directly with consumers, for the purpose of causing

retailers not to trade with the concerns listed, was an unlawful restraint of trade under the Sherman Act. The Court said (p. 612) that the restraint of trade was undue and unreasonable because the practices tended to deprive a wholesaler of the trade of retailers who had no personal grievance against him but who acted because of the grievance of a particular retailer. The Court also said (p. 613) that measures of self-protection could not be adopted which conflicted with the national policy expressed in the Sherman Act of prohibiting practices which unduly obstruct the free flow of trade and commerce.

In the present case the domination of the distributors is so complete that it may not be readily apparent that their combination is, in substance, an agreement not to deal except on jointly predetermined terms. The agreement is to deal only with exhibitors who will accept the Standard Exhibition Contract with its arbitration provisions. By virtue of these provisions and the arbitration rules incorporated therein the distributors agree, first, to demand security and then, if security is not forthcoming, to suspend service on contracts with exhibitors against whom they have no personal grievance, but who have failed to arbitrate or to comply with an arbitration award in a controversy with some other distributor.

Anderson v. *Shipowners Association,* 272 U. S. 359, held that an agreement among shipowners and operators to delegate to a common agency the selec-

tion of employees violated the Sherman Act. This Court said that an undue restraint of trade could not be justified on the ground that the conspirators intended to benefit themselves rather than to restrain commerce.

Montague & Co. v. *Lowry,* 193 U. S. 38; *Loewe* v. *Lawlor,* 208 U. S. 274; and *Binderup* v. *Pathe Exchange,* 263 U. S. 291, *supra,* are other leading cases holding that agreements not to deal, or to deal only on conditions fixed by the combination, are illegal.

A restraint of trade is none the less illegal because it takes the form of compelling acceptance of contract provisions embodying the restraint. *Thomsen* v. *Cayser,* 243 U. S. 66, sustained recovery by shippers of triple damages under the Sherman Act. The plaintiffs in that case alleged a combination of shipowners to coerce and prevent merchants from using rival vessels. One of the means used was the announcement that a rebate of ten per cent of the net freight charges would be paid if the shipper did not within nine months of his shipment make use of any rival vessel. A separate defense to the suit was that the plaintiffs freely and voluntarily paid the freight charges shown on their bills of lading and that, so far as these charges were paid with reference to the announcement of the ten per cent rebate, the plaintiffs knowingly cooperated in the transaction. The Court evidently did not consider this defense of sufficient merit to require discussion. Although it is recited in the Court's statement of the case (p. 73), it is not referred to in the opinion.

If an industry having a substantial monopoly can require persons wishing to engage in business to enter into a form of contract which provides for unreasonable restraint of their interstate commerce, the will of Congress as expressed in the Sherman Act can be nullified. Private contracts can not be resorted to for that purpose. *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211.

The Sherman Act condemns partial restraints if unreasonable; a man does not have to be put out of business for the restraint to become unlawful. The united security demand required when an exhibitor is in default under the arbitration provisions of the Standard Exhibition Contract is a burdensome restraint on his freedom to engage in interstate commerce even though he may be able to deposit the required security and thus continue to operate. If he does not or can not meet the conditions imposed by appellants, namely, compliance with the arbitration award or deposit of the required security on all his existing contracts, we submit that probably he can not continue in business. Appellants' brief (p. 76) states that under these conditions he may do one of three things:

(1) He may "spot book" pictures. But appellants fail to state that to operate regularly by "spot booking" is both very difficult and very expensive. (Record in No. 95 on the current docket of this Court, p. 118.)

(2) He may obtain films from distributors who are not members of any Film Board. But appel-

lants fail to state that their own answer admitted that it was impossible for any motion picture theatre to secure sufficient films for its regular operation without dealing with members of the local Film Board. (R. 14, 115.)

(3) He may make new contracts with member distributors. But appellants fail to state that the court below found that the distributors have announced that it was their consistent policy not to deal with exhibitors who had failed to comply with arbitration awards and that until quite recently the members of many Film Boards had "by supplemental agreements and understandings" agreed not to make such contracts. (R. 165–166.)

Cement Manufacturers Association v. *United States,* 268 U. S. 588, held that members of a trade association could report overdue accounts and could also report whether cement which members had contracted to deliver under specific job contracts was actually being used for the job described in the contract. We submit that there is a clear intimation from the opinion in that case that exchange of the former type of information would have been held illegal if there had been evidence that the members had agreed to collective action based on the information (pp. 599–600), and that exchange of the latter type of information would have been held illegal if there had been evidence that it was used to fix prices, and not simply to enable each member to protect himself against fraudulent orders by

purchasers (pp. 603–604). Even if the members of a trade group may under some circumstances legally agree to demand security prior to opening a new credit account with one who has failed to pay an admitted indebtedness to another member of the group (which the Government does not concede), it would seem that this could be sustained only as a possibly reasonable method of credit self-protection. The agreement here under consideration goes much farther. The agreement is not to contract unless each exhibitor will submit all controversies under the contract to a particular method of arbitration, and the agreement thus applies to exhibitors irrespective of their credit standing. The means of enforcement used, a simultaneous demand for security followed by suspension of service, involves breaking off existing contractual relations for a purpose entirely divorced from the question of the exhibitor's credit standing.

Wolff Company v. *Industrial Court*, 262 U. S. 522, a case involving a wage dispute in a meat-packing plant, held unconstitutional as in violation of the due process clause a statute of the State of Kansas, which empowered an industrial court to hear any dispute over wages or other terms of employment in certain industries declared to be affected with a public interest, and, if the industrial court found the peace and health of the public imperiled by such controversy, to fix wages and other terms for the future conduct of the industry. If,

therefore, a State can not lawfully impose compulsory arbitration upon the motion picture industry, much less should it be within the power of practically all the distributors to do so by coercion exercised through control of the available supply of films. In *In Re Debs, Petitioner,* 158 U. S. 564, 581, a case under the Sherman Act, the Court said:

> If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

The United States District Court for the District of Connecticut in an opinion rendered October 9, 1930, in the case of *The Majestic Theatre Company, Inc.* v. *United Artists Corporation, et al.,* held that the complaint, which alleged a conspiracy in violation of the antitrust laws resulting in injury to the plaintiff, stated a valid cause of action. The complaint alleged that in October, 1927, one Morrison, who had previously operated a theatre in Hartford, Connecticut, leased it to the plaintiff corporation; that the plaintiff later contracted for sufficient pictures to operate for a year from September, 1927; that in September or October, 1927, a distributor obtained an award from the local arbitration board against Morrison; that the defendant distributors then notified the plaintiff that unless $500 was deposited under each contract with them service would

be suspended; that plaintiff declined to make any deposit and service was terminated; that advance payment for films was refused and plaintiff's theatre was compelled to close; and that the financial responsibility of the plaintiff was not open to question. The complaint also alleged that the defendant distributors were unwilling to contract with exhibitors for licensing pictures except by means of a standard exhibition contract containing certain arbitration provisions which they had adopted and agreed to use and that this course of conduct was engaged in by the defendants and all other distributors doing business in Connecticut for the purpose of forcing the plaintiff and any other exhibitor in Connecticut to agree to arbitration in accordance with the terms of the standard contract. The court held that the agreement to compel each exhibitor to submit to arbitration and obey awards was effected by imposing a condition upon the exhibitors's access to the market and that this was a substantial impairment of his right to engage freely in interstate commerce and was unreasonable. The court also held that the means selected to accomplish this object, namely, the requirement of a deposit as a condition of continuing to do business where the exhibitor's credit was not in doubt and where the purpose was to impose the will of the combination on the exhibitor, was illegal. The opinion is printed as an appendix to this brief, *infra*, pp. 57–69.

II

THE ARBITRATION PROVISIONS OF THE STANDARD EXHIBITION CONTRACT AND THE MANNER IN WHICH THEY HAVE BEEN ENFORCED ARE UNJUST TO THE EXHIBITORS

The Standard Exhibition Contract provides that the provisions thereof relating to arbitration "shall be construed according to the law of the State of New York." (R. 73.)

This is no hardship on the distributors, who are guided by New York counsel, but exhibitors, whether doing business in Maine or California or any State other than New York, are thereby compelled to arbitrate under the law of a foreign jurisdiction.

The exhibitors are at a great disadvantage in the matter of personal attendance at arbitration board hearings. An arbitration board sits in each of the thirty-two cities where there is a Film Board. Each distributor has a manager or representative in practically all of these cities. The exhibitors, on the other hand, who are scattered all over the territory covered by the respective Film Boards, are ordinarily not so represented. Many Film Boards cover a wide area. The New England Board, located in Boston, Massachusetts, operates throughout five States and in part of a sixth State, while the Dallas Board operates throughout the State of Texas and in part of the State of Oklahoma. (R. 4, 6.) To attend an arbitration hearing would require the exhibitor in many cases to

travel several hundred miles at a cost in time and money which he can not afford. Not to be present at the hearing obviously puts him at a great disadvantage. The provision in the arbitration rules that if an exhibitor is respondent in a claim and is successful the board may in its discretion award him his railroad fare and an additional $10 (R. 107) is utterly inadequate.

The arbitration rules permit distributors to file claims with the arbitration board in the city from which the respondent exhibitor is served. (R. 108.) Thus, a claim against an exhibitor in Portland, Oregon, was filed with the arbitration board in Seattle, Washington, although there is a Film Board located in Seattle. (R. 11, 810–811.) The Film Board in Salt Lake City distributed films in the States of Idaho, Montana, and Utah and in a few cases in Arizona, Colorado, New Mexico, North Dakota, Oregon, Washington, and Wyoming. (R. 428–429.) If a distributor filed a claim on any of the films so distributed it would be heard by the arbitration board in Salt Lake City.

The minutes of the Philadelphia arbitration Board (Gov. Ex. 38, R. 1579) show that two hundred fifty-nine claims were passed upon by the board in 1928. The minutes do not show whether or not the exhibitor was present in one hundred and seven of these claims. Of the remaining one hundred and fifty-two claims the exhibitor was present in person or by representative in only twenty-seven cases, or less than eighteen per cent of the cases

where the minutes disclose his presence or absence.

There are numerous reasons why the arbitration boards as actually organized and operated do not afford exhibitors fair or equal representation. Each of four Film Board secretaries testified that he acted as secretary of the local arbitration board. (R. 342, 353, 361, 390.) In the case of most of the other secretaries who were witnesses the testimony indicates that each was also secretary of the local arbitration board. In one case the manager of the exhibitors' association and the Film Board secretary alternated in acting as secretary of the arbitration board (R. 347) and in another case the secretary of the local exhibitors' association was the secretary of the arbitration board (R. 329). The secretaries of the arbitration boards participated in their deliberations. (R. 1554.) The distributors thus frequently had an additional representative present who might influence the board's action.

At an annual convention of Film Board secretaries (R. 1529) Mr. Hess indicated the part which these secretaries should play with reference to exhibitor representation on arbitration boards. He said (R. 1551):

> Now, you have often heard Mr. Pettijohn and me say, and I have written to you quite often to the same effect, that when your Board of Arbitration work is stopped and you just can't go on with your arbitrators and everything is all blocked because of some conflict you are having with your local exhibitors' organization, remember we have the

> means and the method provided for in the rules to get other exhibitor arbitrators. Of course, you should be reluctant to exercise this right, because we want always to try to keep the representatives of the local exhibitors' organization as members of the board of arbitration.

The rules of arbitration prevent the manager of a theatre owned or controlled by a distributor or producer from acting as an exhibitor arbitrator, but do not prevent a theatre owner or operator who is also an agent of a distributor from acting as an exhibitor representative on the arbitration board. (R. 80.) One of the exhibitor members of the arbitration board in Washington, D. C., regularly appointed to that board by the local exhibitors' association, owns a small theatre, but is also connected with the real-estate department of a company owned and controlled by one of appellant distributors. (R. 384–385.)

We submit that, even disregarding these special factors, exhibitors are at a disadvantage when claims come before the arbitration boards. Each distributor arbitrator is an employee of an organization making thousands of contracts yearly and interested in establishing precedents favorable to the distributors. The distributor arbitrators are also in close contact, through the Film Boards, with their fellow members whose claims they rule upon. On the other hand, exhibitor arbitrators may well fear to arouse the antagonism of those from whom

they obtain their necessary films and who are so thoroughly organized. There would ordinarily be little community of interest or personal contact between the particular exhibitor members of arbitration boards and the exhibitors whose controversies came before them.

That appellants consistently made coercive use of arbitration boards seems clearly evidenced by the use made by them of the Federal Copyright Law as applied to cases of "bicycling" or unauthorized showing of films.

Section 25 (b) of the Copyright Law, c. 320, 35 Stat. 1075, 1081; c. 356, 37 Stat. 488, 489 (U. S. C., Title 17, Sec. 25), provides that any person infringing a copyright shall be liable for the damages suffered by the copyright owner and for the profits of the infringer or "in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow," in cases not specifically provided for, not more than $5,000 nor less than $250.

Section 371 of Title 28 of the Judicial Code (par. 5) provides that the jurisdiction vested by this law in the Federal courts shall be exclusive of the courts of the several States, and it would seem questionable whether arbitration boards could enforce its provisions. But aside from this question of law, the use which appellants made of this section is illuminating. Mr. Hess at New York virtually

dictated that the arbitration boards should disregard that part of the section permitting recovery on the basis of actual damages. The 1928 Arbitration Rules provide (R. 113):

> The amount of damages which the Board of Arbitration shall award for "bicycling," "switching," or any other unauthorized exhibition of a photoplay shall be determined and limited as provided in Section 25 of the Copyright Law of the United States provided that if the Board of Arbitration shall find that any such act was not wilfully done then such damages shall be fixed at not less than one hundred dollars ($100).

At the outset he declares that his first work will be to convince Arbitration Boards to use the United States Copyright Law as a basis. (R. 1291.) To discourage distributors from making individual settlements with exhibitors who had shown a picture without authority, he recommended that the Film Boards set up "Bicycling Committees" to handle this class of claims. (R. 1290.) The St. Louis Film Board forbade any member to settle a bicycling claim, ruling that in each case the claim must be filed with the arbitration board through the "Bicycling Committee." (R. 907.) These claims were to be submitted to Mr. Hess in New York before being filed with the arbitration boards, and were not to be settled unless the distributors were so advised by his office. (R. 1292.) The "Bicycling Committee" must notify the offending ex-

hibitor that the claims are reviewed by New York and that the Committee had no control over accepting an offer that might be submitted by the exhibitor. (R. 1374.)

As previously stated, Mr. Hess advised arbitration boards to disregard that part of Section 25 of the Copyright Law which provides for actual damages and profits and to award in all cases at least the $250 which under the law could be given in the discretion of the "court." (R. 1203, 1258, 1288.) In a letter to all secretaries of boards of arbitration, dated May 4, 1927 (R. 1258–1259), after calling attention to the maximum and minimum provisions of Section 25, he said that the arbitration boards "should, if they conclude that an award should be made, fix the damages at not less than nor greater than *the amounts specified* in the Copyright Law." (Italics ours.) In a letter to all secretaries of arbitration boards, dated October 9, 1928, he enclosed certain forms which he recommended be used for complaints filed with the boards. (R. 1268, 1270.) The form to be used in the case of an unauthorized exhibition of a motion picture provides in part (R. 1272):

> * * * we hereby demand that the Board of Arbitration, in lieu of our actual damages and profits, * * * allow an amount provided for by the Copyright Law of the United States, which law provides that in such cases damages shall not exceed the sum of $5,000 nor be less than the sum of $250.

Mr. Hess repeatedly advised what amount the individual distributor should claim, upon what terms settlement, if any, should be made, etc., sometimes virtually overruling the views of the local Film Board. (R. 1167–1170, 1172, 1175, 1178–1179, 1195–1198, 1203, 1257, 1354–1355, 1374.)

The effect of these activities was to remove from the injured distributor discretion as to the amount of the claim to be presented to the arbitration board or the amount of settlement, if any, to be accepted. That the appellants by this procedure were in reality seeking to inflict a coercive penalty by means of the arbitration awards rather than collect actual damage is indicated by the following statement issued by Mr. Hess (R. 1310):

> Many exhibitors making a practice of bicycling immediately they learn an investigation of their operations has been or is being conducted rush into the exchange centers and by offering to make new contracts or to pay an amount of money succeed in settling the claims against them. This results, *first in discouraging, if not preventing, a prosecution under the penal provisions of the United States Copyright Law,* and second in keeping from the trade generally and from distributors in particular the knowledge that an exhibitor has been found to be a bicycler. (Italics ours.)

This intention to use arbitration process for the purpose of penalizing a breach of contract was not confined to Mr. Hess. A woman exhibitor at Gilles-

pie, Ill., manager of two theatres, showed at both theatres a comedy film authorized for only one theatre. The current rental for her films varied from $3.50 to $5.00 each. Claim was filed against her for $817.50 for unplayed future service and $1,000 for the unauthorized one day showing of the film. (R. 928–930.) The St. Louis arbitration board determined, "That a penalty of $250 be assessed * * * this penalty of $250 to be paid to the Pathe Exchange, Inc." (R. 931.)

These rulings of Mr. Hess produced some extraordinary results. In a case where the film rental did not exceed $57.50 the arbitration board, as advised by Mr. Hess, awarded $1,750. (R. 1526, 1527.) The Film Board secretary wrote in this case (R. 1524):

> When I mentioned to him the figure of $1,750.00, he threw up his hands and said, "Put me in jail."

When the Film Board secretary subsequently wrote that the exhibitor was absolutely penniless and had not even enough money to pay the $57.50 which he admitted he owed, Mr. Hess gave discretionary power to negotiate a settlement. (R. 1527–1528.)

In another case where an exhibitor, having contracted for exhibiting a film at one theatre, showed it at another theatre and asserted that this was done while he was trying to get the salesman to reduce the rental from $7.50 to $5.00, the arbitration board awarded $1,000 damages and fixed $500 as the max-

imum security. (R. 860–866.) Subsequently, on the advice of Mr. Hess, the distributor agreed to withdraw the claim upon the payment of $15. (R. 868.)

An additional cause of the exhibitors' dissatisfaction with arbitration was that arbitration boards, as advised by Mr. Hess, could not recognize verbal understandings between the parties. (R. 1249.) This exclusion of equitable considerations was one of the features of arbitration which led the president of an association of exhibitors in the Northwest to complain to Will H. Hays, the president of Motion Picture Producers and Distributors of America, Inc., that the distributor members of the local arbitration board disregarded equity and justice and insisted on arbitrating according to the rules and the written contract, thereby making the board merely an agency for enforcing or interpreting the contract. (R. 1865–1866.)

Government Exhibit 38 contains the minutes of the Philadelphia arbitration board for the year 1928. (R. 1579.) It was stipulated that these minutes were typical of the operations of other arbitration boards. (R. 336.) An analysis of the awards made by this board conclusively shows that the arbitration machinery is used almost exclusively by the distributors and that they obtain an award on almost every claim which they present, whereas the exhibitors obtain an award on only a little over half of their claims. Of 275 decided claims, 259, or over 94 per cent, were filed by distrib-

utors. Of these 259 claims, all but 4, or over 98 per cent, were decided in their favor. Of the 16 claims filed by exhibitors, only 9, or less than 57 per cent, were decided in their favor.

III

THE EVIDENCE INDICATES THAT A GREAT MAJORITY OF THE EXHIBITORS WHOSE THEATRES ARE NOT OWNED OR CONTROLLED BY DISTRIBUTORS OR PRODUCERS DISAPPROVE THE ARBITRATION PROVISIONS OF THE STANDARD EXHIBITION CONTRACT

Appellants' brief makes the statement (p. 8), without record reference, that their evidence shows that "thousands of exhibitors are supporting" the arbitration plan. This statement apparently is based on the testimony of eight Film Board secretaries (referred to on page 77 of appellants' brief) as to the support and cooperation offered by exhibitors in participating in the arbitration proceedings provided for in the Standard Exhibition Contract. The testimony of these eight witnesses (twenty-four Film Board secretaries having testified as witnesses in this case) was that the exhibitors in their respective territories—

(1) "cooperated in arbitration;" (R. 411)

(2) "support the arbitration plan;" (R. 425)

(3) "cooperated in the arbitration work very much;" (R. 429)

(4) "cooperated * * * in the arbitration work;" (R. 434)

(5) "supported arbitration;" (R. 435)

(6) "work in cooperation with the Film Board of Trade on arbitration;" (R. 437)

(7) "cooperated with the members of the Film Board of Trade in arbitration;" (R. 438)

(8) "There are no complaints. They bring claims before the Board. * * * The plan has improved the good will of the industry." (R. 424.)

The exhibitors, not being able to obtain films except by signing a contract providing for arbitration of all contract disputes, were in self-protection forced to cooperate, to the extent of appointing exhibitor arbitrators, in carrying out the system of arbitration imposed upon them by the distributors. The arbitration rules provide for the appointment of exhibitor arbitrators if there is no local exhibitors' association or if it fails to appoint exhibitor arbitrators. (R. 104.) Exhibitors naturally preferred to have their own representatives on the arbitration boards, rather than representatives appointed by third persons. The distributors obtained outside appointment of exhibitor arbitrators when a local association of exhibitors, due to dissatisfaction with the way arbitration was working, failed to appoint arbitrators. (R. 389.) Exhibitors were compelled to defend before the arbitration boards the claims filed by distributors, since otherwise these claims would be decided against them by default. (R. 109.) It seems significant that none of appellants' witnesses testified that the exhibitors *approved* the arbitration provisions of the Standard Exhibition Contract. The only direct

testimony even inferentially leading to this conclusion is that they "support the arbitration plan." (R. 425.)

Appellants' brief seems to attach great importance to the signing of the uniform contracts by the exhibitors who participated in their negotiation. We submit that the signing of the uniform contracts by these exhibitors does not evidence their approval of the arbitration provisions. They accepted the contracts, which in addition to the arbitration provisions contained many other provisions of great importance to exhibitors, as representing on the whole an improvement upon the contracts then in use. We further submit that the evidence conclusively shows that the arbitration provisions of the Standard Exhibition Contract and the arbitration rules incorporated therein were totally at variance with the views and desires of the exhibitor group who participated in the negotiations and did not meet with their approval.

The first uniform contract was put into effect in April, 1923. Prior to this the distributors in several exchange centers had adopted what was known as the "Hoy System" for enforcing compliance with contracts by exhibitors. (R. 300–301, 323.) This involved an ironclad agreement between the distributor members of a local "club" either to demand high security or to cut off the service of any exhibitor who failed to live up to a contract. (R. 323.) It also involved a so-called arbitration of

disputes. This simply meant that a committee of distributors heard, without giving the exhibitor an opportunity to explain, any complaint that an exhibitor had broken his contract. Whatever decision the committee made was transmitted to the remaining members of the "club." (R. 301.) One of appellants' witnesses described the distributors as being in this connection "judge, jury, and prosecuting attorney as well." (R. 324.) This system was maintained in New York and Chicago (R. 301), St. Louis (R. 424), and probably Omaha (see *Binderup* v. *Pathe Exchange,* 263 U. S. 291, *supra*). On the other hand, voluntary systems for the arbitration of disputes were maintained in Detroit, Minneapolis, and Washington, D. C. (R. 281, 453, 1429.) The president of the Northwest Theatre Owners Association testified that in his territory there were no drastic provisions for the enforcement of awards but that so far as he knew awards were unanimously complied with. (R. 453.)

The original exhibitors' committee which met with the distributors in 1922 to negotiate a uniform contract was the board of directors or the executive committee of the Motion Picture Theatre Owners of America. (R. 454.) These members of the committee refused to approve or adopt the contract adopted by the distributors in 1923; the only representatives of exhibitors who seem to have approved this contract were those of New York exhibitors' organizations. (R. 637–639.) In May, 1923, the Motion Picture Theatre Owners of

America unanimously adopted a report of its board of directors which stated that there was a complete failure of agreement on—

> the inclusion of an arbitration agreement as part of the contract and the fixing of penalties by the arbitration board. (R. 1893.)

This national organization of exhibitors at the same time unanimously adopted certain resolutions reading in part as follows (R. 1904):

> Whereas the contract offered by the Hays organization contains these obnoxious clauses:
>
> * * * * *
>
> The arbitration clause which attempts to deny our constitutional right to trial by jury and to compel our members from California to Maine to arbitrate under the laws of the state of New York and under rules drawn up by the distributors.
>
> Resolved that we heartily approve the action of our officers and directors in rejecting the so-called uniform contract, and
>
> Be it further resolved, that we urge all exhibitors not to sign this unfair, inequitable, un-American contract that members of the Motion Picture Producers and Distributors of America, Inc., are attempting by concerted action to force upon the exhibitors of this country.

Negotiations leading up to the uniform contract which the distributors adopted in 1926 were conducted by a committee appointed by the president of appellant Motion Pictures Producers and Dis-

tributors of America, Inc. (R. 457, 1871.) The distributors at the outset informed the exhibitors that no change in the principle of the arbitration plan would be considered. (R. 473.) One of the exhibitors who signed the contract finally adopted testified that the exhibitor members believed that it was the best they could get at the time and that it was a step in the right direction. (R. 458.) He also testified that although he secured permission from his State organization to serve on the committee, he was not given any authority to bind it or its members. (R. 457.) Another exhibitor who signed the contract testified that he arrived in New York about two hours before the adjournment of the conference and that his reason for signing was that it was the best contract they could get. (R. 466–467.) This witness signed the contract as an individual and not as a representative of his State Association. (R. 467.) Mr. Pettijohn, general counsel of appellant Motion Picture Producers and Distributors of America, Inc., admitted that the committee which approved the 1926 contract had no authority to bind any one. He said (R. 1907):

> The committee that sat in on the uniform contract was not a legally constituted body or particularly authorized by anybody. Nobody denies that fact.

The committee which signed the Standard Exhibition Contract of May 1, 1928, grew out of a trade practice conference conducted by a Commis-

sioner of the Federal Trade Commission in October, 1927. The principal purpose of the conference was to reach an agreement which would meet the Commission's views with regard to the "block-booking" of pictures. (R. 546.) At the conference the president of Motion Picture Theatre Owners of America introduced the following resolution (R. 1837–1838):

> Whereas the Standard Exhibition Contract contains clauses and added clauses which in actual operation have proved to be unfair and prejudicial to the interests of exhibitors; and
>
> Whereas experience has demonstrated that in numerous instances said contract has been employed unfairly and unjustly to further the interests of the producers and distributors and to the prejudice of exhibitors; and
>
> Whereas it is absolutely impossible for exhibitors to obtain product for exhibition without signing said contract and acceding to said clauses:
>
> Now, therefore, be it Resolved: That it is the sense of this conference that the continued use and enforcement of said Standard Exhibition Contract constitutes an unfair trade practice, and it is further:
>
> Resolved That a body of seven be immediately selected, consisting of three members chosen by the exhibitor delegates here assembled, three members by the producer-distributor delegates and one to be designated by the Federal Trade Commission to act as

> Chairman, with full power to investigate and adopt a contract which shall be fair and equitable to both sides and insure justice to all parties.

Counsel for appellant Motion Picture Producers and Distributors of America, Inc., immediately introduced a substitute resolution. (R. 1838.) The substitute resolution provided for the appointment of a committee to develop improvement in the existing uniform contract and in the rules for arbitration and to develop a plan for the further operation of arbitration. The committee was to be composed of three exhibitor members and three producer-distributor members and a seventh member in the event of disagreement to be appointed by the Chief Justice of this Court. The resolution further provided (R. 1840)—

> that the use of a Standard Uniform Contract providing for arbitration both of disputes arising out of said contract and of the provisions of the contract itself is a fair trade practice.

The exhibitor members objected to immediate consideration of this resolution and the president of Motion Picture Theatre Owners of America said that it was very essential that the exhibitors consider the resolution in a separate meeting that night. (R. 1842.) The distributors insisted on an immediate vote, denying that there was any joker hidden in it. (R. 1844, 1846.) After an exhibitor had questioned the meaning of the substitute reso-

lution the presiding Federal Trade Commissioner expressed the opinion that the resolution clearly endorsed merely the principle of arbitration and not the particular provisions of the existing contract or arbitration rules, and it was then adopted. (R. 1845–1846, 1850.)

The contract committee was in session from January 31 to February 6, 1928, and from February 15 to February 21, 1928. (R. 651, 684.) When the arbitration provisions were reached, the exhibitors recommended that the existing contract be rewritten to make arbitration optional with both parties. (R. 665.) The distributors rejected this proposal. (R. 665.) The exhibitors then stated that since each side sincerely believed in the justness of its position, the question of whether arbitration should be compulsory or optional should be referred to the seventh arbitrator. (R. 679–680.) The distributors replied that the adoption of this proposal would be a direct repudiation of the resolution passed at the trade-practice conference and that under that resolution the question of whether or not arbitration should be optional could not be submitted to a seventh arbitrator. (R. 680–681.) The distributor members of the committee thereby repudiated the presiding Commissioner's interpretation that the resolution approved the principle of arbitration, but not any specific system of arbitration. (*Supra*, p. 52.)

The exhibitors' next proposal, that the enforcement provisions relating to arbitration be elimi-

nated, was rejected by the distributors. (R. 681–682.) The exhibitors then proposed that one per cent of film rentals be divided between the distributors' and exhibitors' organizations so that the cost of arbitration could be properly financed. (R. 693–694.) The distributors suggested a different method of financing the cost of arbitration, but stated that this was beyond the scope and province of the contract committee. (R. 694, 697.) Finally, the exhibitors approved the existing arbitration provisions on the condition that an immediate effort would be made to work out a plan of adequately financing exhibitor organizations. Their position was stated as follows (R. 698):

> The Exhibitor group approve the present Arbitration clause now known as Clause Twentieth, with the understanding that an immediate effort will be made to provide ways and means to insure the future of arbitration and other necessary activities of benefit to the entire industry through a plan of adequately financing exhibitor organizations.
>
> We feel that the present plan of having the Distributors, through the Film Boards of Trade, organized and many States with inadequate Exhibitor organizations does not tend toward equity in arbitration.
>
> *If prior to June 1st no such plan is agreed upon, this Continuing Committee on the Contract will again meet * * * specifically to discuss a more equitable method of arbitration in the absence of a plan to pro-*

*vide the help necessary to carry on arbitration and other necessary activities, * * *.*

The contract committee did not meet in June. Its first meeting after the Standard Exhibition Contract was signed in February, 1928, was in October of that year. (R. 476–477.) At that time the distributors proposed that the theatre owners affiliated with producers or distributors would be induced to join the State exhibitor organizations as dues-paying but nonvoting members. (R. 477.) An exhibitor member of the contract committee testified in this case on March 25, 1929, that up to that time nothing had been done to carry out this proposal. (R. 473, 478.)

To summarize, the uniform contracts adopted in 1923 and 1926 grew out of committees in which the exhibitor representatives were entirely unofficial and, in fact, were selected by the distributors. Both contracts were condemned by the national organization of the exhibitors. The Standard Exhibition Contract of 1928 grew out of a trade practice conference at which the exhibitor group proposed a resolution reciting that the continued use and enforcement of the uniform contract constituted an unfair trade practice, although a substitute resolution proposed by the distributors was rushed through without allowing the exhibitors opportunity for adequate consideration. When the contract committee was organized, the exhibitor members first proposed making arbitration optional and then proposed eliminating the enforcement pro-

visions relating to arbitration. The distributors flatly rejected these proposals and also induced the exhibitors to believe that under the terms of the resolution creating the committee these proposals were outside the jurisdiction of the committee. Finally, the exhibitor members of the committee were induced to accept the contract on the condition that a plan be worked out to finance exhibitor organizations. At the same time they stated that the existing system did not tend toward equity in arbitration.

We submit, therefore, that there is a clear inference from the history and antecedents of the arbitration provisions of the Standard Exhibition Contract that a majority of the exhibitors whose theatres are not owned or controlled by distributors or producers disapprove the arbitration provisions of the Standard Exhibition Contract and the arbitration rules incorporated therein.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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OCTOBER, 1930.

APPENDIX

District Court of the United States
District of Connecticut

The Majestic Theatre Company, Inc., *v.* United States Artists Corporation, Fox Film Corporation, Vitagraph, Inc., and New Haven Film Board of Trade. No. 3259, Law

Burrows, D. J.:

This is an action at law, alleging a conspiracy in violation of the antitrust laws resulting in injury to the plaintiff. The defendants, in addition to filing answers admitting or denying particular allegations of the complaint, pleaded a special defense, identical in form as to each of the defendants, by way of confession and avoidance. To this defense plaintiff demurred, and the matter is before the court on this demurrer.

One of the principal claims made by the defendants, both in argument and brief, is that the complaint does not set out a good cause of action; claiming among other things that the defendants were not engaged in interstate commerce; that it did not appear that the combination controlled the film business; and that the contracts under which the defendant distributors acted were voluntarily entered into by the plaintiff, and therefore the conduct complained of was *damnum absque injuria.* The defendants contend that they may attack the complaint through the plaintiff's demurrer to their

special defense on the authority of *Bishop* v. *Quintard,* 18 Conn. 395, which held as an established rule of pleading that a demurrer searched the entire record. But is very doubtful if that rule is now sanctioned in Connecticut, since the statutory requirement is that a demurrer must be special, and specifically set forth reasons why the pleading in question is insufficient. *Schroeder* v. *Tomlinson,* 70 Conn. 348, 351. The rules under the Practice Act of Connecticut provide that the demurrer is the only remedy before trial by which to test the sufficiency of a cause of action. Connecticut Practice Book, 1922, page 287. If a defendant deems a complaint to be insufficient, the proper procedure provided by the rules is to demur. It is the present practice in this state. Also, if the complaint is not specific in its allegations, the remedy is by motion. Connecticut Practice Book, 1922, page 295. Rules of pleading in this court conform to rules of pleading under the Connecticut Practice Act. See District Court Rule 8. Inasmuch, however, as the parties have, both orally and in brief, argued the demurrer to the special defense with the allegations of the complaint as a basis, I will assume for the moment that it is proper to examine the complaint to determine whether or not there is alleged a cause of action under the antitrust laws.

An examination of the complaint reveals that in February, 1926, the leading distributors of moving pictures in the United States, including the defendants, adopted and agreed to use a so-called Standard Exhibition Contract, and from then until May, 1928, i. e., the date of the writ, were unwilling to contract with exhibitors for licensing pictures ex-

cept in this form. Paragraph 20,[1] the only relevant section of this contract, relates to arbitration, and this is set out in full in a note below. It expressly provides that this paragraph shall be construed according to the laws of New York. The substance of this paragraph is that each party agrees to submit any controversy under said contract to the Board of Arbitration located in the city where the Distributors' Exchange is maintained. They agree to abide by the award and accept as final any finding of facts. If an exhibitor refuses to submit to arbitration or abide by an award under the contract with the particular distributor or *under a contract with any other distributor,* or if the Board finds a breach of contract which in its opinion justifies the demand of security by the particular distributor, *or any other distributor,* in dealing with the exhibitor, then the distributor may require the payment of an additional sum not to exceed $500 under each existing contract, to be retained by the distributor until all contracts are completed. At this point it is to be observed that *each contract* between an exhibitor and a distributor gathers within its effect not only the immediate distributor but all other distributors having similar contracts and apparently distributors having no contracts—that is, all distributors who are parties to the combination and with whom it may be necessary for a particular exhibitor to deal.

The distributors in the United States carrying on business in Connecticut maintain through their branch offices or exchanges, the New Haven Film

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[1] Paragraph 20 is not printed since it appears in full (R. 56–58) in the record in the case now before this Court.

Board of Trade, one of the defendants herein, which covers in its operations the entire state. An exhibitor in Connecticut is unable to secure sufficient films without dealing with one or more members of this Board; that is, the plaintiff or any other exhibitor in Connecticut can not go into an open film market, but must deal, if at all, with the distributors of films according to the organization created by them acting in combination. This organization apparently contemplates national distribution through state-wide exchanges. If films are wanted for showing in Connecticut, they must be procured in Connecticut from members of the defendant Film Board of Trade. The defendant Film Board of Trade in 1926 duly created a Board of Arbitration under the Standard Exhibition Contract, which proceeded to hear disputes, make awards, and fix the sum which might be demanded by a distributor in dealing with an exhibitor. Its decisions were duly transmitted to the Secretary of the Film Board, and he in turn would notify each member thereof, including the defendants. It is apparent, therefore, that substantially all the distributors doing business in Connecticut and with whom an exhibitor must deal were members of the combination, who were willing to contract in the standard form, or not at all, with its provisions for arbitration, and who, in pursuance of contracts with a particular exhibitor, might demand security, or apparently might demand security, even though they had no contract, if notified of the appropriateness of so doing by the Board of Arbitration. In fact, it is alleged in the complaint (paragraph 30) that all of the members of the Film Board—that is,

substantially all distributors of films in Connecticut—were parties to the combination to insist upon such contract with its arbitration features and this is also the only permissible inference. *Eastern States Retail Lumber Dealers' Ass'n* v. *U. S.*, 234 U. S. 600, 612.

Prior to April 18, 1927, one A. C. Morrison owned and operated the Majestic Theatre in Hartford. Mr. Morrison had a contract with Tiffany Productions, Inc., to exhibit certain of its pictures at said theatre. Tiffany was a member of the defendant Film Board of Trade, and by necessary inference of the alleged combination. On or about April 18, 1927, Morrison leased said theatre to the plaintiff corporation, which continued to operate it until October, 1927, when the theatre closed and did not reopen. Shortly before June 5, 1927, Morrison had a dispute with Tiffany, and Tiffany refused to forward any more pictures for exhibition at the theatre. The plaintiff corporation then made contracts in the Standard Form for future showing of films with the defendant distributors beginning in September, 1927. These contracts provided for a sufficient number of films to keep the theatre in operation throughout the following year. The defendant distributors were all corporations of states other than Connecticut, engaged in the business of producing and distributing pictures throughout the United States, and duly admitted to Connecticut and maintaining branch offices in New Haven. Plaintiff, however, was compelled to close its theatre during the summer of 1927 because it was unable to get any pictures at all from any distributor in Connecticut because of the dispute between Morri-

son, the individual, and Tiffany—that is, no member of the combination would deal at all with the plaintiff. Tiffany later referred the dispute to the Board of Arbitration at New Haven, and the Board in September or October of that year notified the Secretary of the Film Board of its award against Morrison, the individual, and in turn the Secretary notified the defendant distributors, and presumably all other members in accordance with the practice hereinbefore described. The defendant distributors then notified the plaintiff that unless $500 was deposited under each contract with them, service would be suspended. Plaintiff corporation declined to make any deposit, and service was terminated. Said Morrison, President of the plaintiff corporation, then offered to defendant distributors payment in advance in cash for the films booked for immediate showing. This was refused. Although the plaintiff's financial standing was not in question, defendant distributors declined to furnish pictures under their contracts unless the $500 deposit was made, because of the claimed default of Morrison personally with Tiffany; plaintiff was also unable to secure pictures from *any other distributor* member of said Film Board, except upon making a $500 deposit, on the ground that the plaintiff was in default. It is further alleged that this course of conduct was engaged in by the defendants and all other distributors in the United States doing business in Connecticut, for the purpose of forcing plaintiff and any other exhibitor in Connecticut to agree to arbitration in accordance with the terms of the Standard Contract; that as a result of this combination and the refusal of the plaintiff to make the

deposits required, it was unable to get films and was compelled to close its theatre and has thereby suffered great damage.

Without further comment upon the allegations of the complaint and without considering the effect of the allegations of the special defense, I will state that I am of the opinion that a good cause of action has been alleged with sufficient particularity.

The claim that the defendants are not engaged in interstate commerce is without merit in view of the decisions in *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291; *Fox Film Corp.* v. *Trumbull*, 7 Fed. (2nd) 715; *U. S.* v. *Paramount Famous Lasky Corporation*, 34 Fed. (2d) 984. Whether or not the contracts were voluntarily entered into will be discussed subsequently, but I will here state that these contracts were not voluntarily entered into by the plaintiff. Assuming that they were, the claim of immunity based upon such contracts is not a complete defense, as it in no way relates to the members of the combination who, having no contract, refused to do business except upon condition of making a deposit, and for which conduct the defendants as members of the conspiracy are liable. It is likewise clear that the claim that the combination, including the defendants, did not completely control the film market open to the plaintiff is without support on the allegations of the complaint.

The existence of a combination, its object, and the means selected to achieve that object being clearly set forth, the essential question as to the complaint is whether the combination is in violation of the Sherman Law. The object of the combination, so far as Connecticut is concerned, is to

compel all exhibitors to submit to arbitration and obey awards. The agreement to submit is effected through an unwillingness to contract on any other basis, and as an exhibitor must accept this contract or secure no films, it is in reality a condition imposed upon his access to the market. It is a substantial impairment of his right to freely engage in interstate commerce and is unreasonable. The object of the combination is therefore unlawful. *Wolff Co.* v. *Industrial Court,* 262 U. S. 522; *U. S.* v. *Paramount, etc., supra.*

I am further of the opinion that the means selected to accomplish this object are unlawful. If there had been a concerted refusal to deal altogether for the purpose of forcing the plaintiff or said Morrison to settle his dispute with Tiffany Company, the answer would be certain. *Loewe* v. *Lawlor,* 208 U. S. 274; *Eastern States Retail Lumber Dealers' Ass'n.* v. *U. S., supra.* It appears that this did happen in the summer of 1927. Does the requirement of a deposit as a condition of doing business, instead of complete refusal, where the plaintiff's credit is not in doubt, produce a different legal result? Clearly the question is one of degree. But I think the exacting of an extra payment of this size as a condition of doing interstate business for the purpose of imposing the will of a combination on a citizen is prohibited by law. *Thomsen* v. *Cayser,* 243 U. S. 66.

Having determined that the complaint sets forth a good cause of action, does the special defense nevertheless offer a valid excuse? For the purpose of determining that question, the traversable allegations of the complaint are deemed to be admitted. Will's Gould on Pleadings, 6th Ed., page 510 et seq.

The substance of this defense is that the plaintiff corporation has no reality aside from Morrison; that Morrison owns all the stock and is in control of its operations and contracts; that its credit and business reputation was entirely dependent upon Morrison; and that Morrison treated it as his enterprise, agent and alter ego. Further, that Morrison, prior to the incorporation of the plaintiff, was familiar with the film industry, knew all about the Standard Exhibition Contract, formed the plaintiff corporation for the express purpose of entering into such contracts with the provisions for arbitration, and actually caused it to enter into such contracts; that with respect to the contracts made between plaintiff and the defendant distributors, they were in the Standard Form, and that all of the acts of the defendants complained of were strictly in accordance with the terms of the contract and that therefore the plaintiff has no remedy.

To make these contracts with the plaintiff the foundation of a defense as alleged, it is, of course, necessary to disregard the corporate entity of the plaintiff and consider it identical with Morrison, so that the grievance against Morrison can be treated as a grievance against the corporation. It is to be observed that, aside from alleging that the credit and business reputation of the plaintiff depended upon that of Morrison, nothing whatever appears to throw doubt on the credit or reputation of either the plaintiff or Morrison. The fact that a contract with Tiffany was largely unperformed and that an award was entered against Morrison certainly does not support any claim of fraud, or the use of the plaintiff as a means of avoiding any contractual

obligation. There is no allegation, for example, that Morrison individually was not financially responsible, or that the theatre was his only asset, or that the plaintiff was formed to enable Morrison to evade any obligation. It is alleged in the complaint, and not denied in the special defense, that the financial responsibility of the plaintiff was not open to question, and that cash was tendered the defendant distributors for the pictures contracted for, for immediate showing.

However, in spite of this absence of any alleged facts which would be relevant, the defendants urged at length in argument that the plaintiff was a shield to enable Morrison to default on his contract with Tiffany; that the lease of the theatre to the plaintiff was fraudulent; and that the whole behavior of the distributors in Connecticut was in defense of sound credit and that, therefore, the combination came within the decision of Judge Thacher in *U. S.* v. *First National Pictures,* 34 Fed. (2nd) 815.

I am of the opinion that the facts of this case do not bring it within the First National Pictures case in any way nor within the doctrine of the so-called credit cases. *Maple Flooring Manufacturers Ass'n.* v. *U. S.,* 268 U. S. 563; *U. S.* v. *Fur Dressers' & Fur Dyers' Ass'n,* 5 Fed. (2nd) 869.

I am further of the opinion that on the allegations of the complaint and special defense a situation is not presented for the application of the principle that the corporate veil may be pierced. *Continental Tyre & Rubber Co.* v. *Daimler* (1915), 1 Q. B. 893; *Donnell* v. *Herring-Hall-Marvin Safe Co.,* 208 U. S. 267; *Pierce* v. *National Bank of Commerce,* 13 Fed. (2nd) 40.

This being so, manifestly the defense is inadequate in an action by the plaintiff who, so far as the pleadings show, was a stranger to the controversy between Morrison, individually, and Tiffany.

Even assuming, however, that for the purpose of this demurrer Morrison and the plaintiff are one, the special plea is inadequate in that it offers no defense whatever for the acts of the other members of the alleged conspiracy in Connecticut, who had no contracts with the plaintiff or Morrison. Their refusal to deal except on condition of making the deposit was manifestly a part of the general conspiracy, and for these acts the members selected for suit are liable. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 249.

The really important element in the defense, so far as these defendants are concerned, and in fact as far as the distributors in general are concerned, is the claim of the validity of the acts under and in accordance with the terms of the Standard Exhibition Contract. For, assuming that Morrison and the plaintiff are identical, the question is whether the defendants were justified as a matter of law in their conduct simply because it was strictly in accordance with the Standard Contract.

Of course, in order to reach this point in the defense, it must be assumed that the object of the combination, alleged and admitted, was lawful. I have already held that the object was unlawful, and, such being the case, the acts of the defendants, no matter how innocent, become unlawful. I will proceed, nevertheless, to consider this claim because of its importance to the defendants.

The reasoning of the defendants is that if the plaintiff, with full knowledge of the conditions of the industry, voluntarily, with its eyes open, enters into contracts which provide for certain behavior under certain conditions, then, if such behavior ensues in strict accordance with the contracts, the plaintiff can not complain. The weakness in this defense is that the contract on the plaintiff's part is not voluntary. As Judge Thacher said in *U. S. v. Paramount, etc., supra,* at page 989:

> In fairness it can not be said that the restraint imposed upon these exhibitors is voluntary because they accept and agree to be bound by the contracts. They can have none other, because the defendants have agreed that they shall not; and, unless something more than the mere acceptance of all they can get is shown, they must be said to have acted under an involuntary restraint, imposed and continued by the defendants to the end that the contracts shall be signed and their terms obeyed. That such coercive restraints upon the commercial freedom of an exhibitor, who was neither represented nor consulted with reference to the agreement to adopt the standard form of contract, is undue and unreasonable, both at common law and under the Sherman Act, I can not doubt. Gains resulting from such restraints to the industry as a whole do not in the eyes of the statute justify the vicarious sacrifice of the individual, even for the sake of bigger and better business.

If an industry having an essential monopoly in a particular community could require persons wishing to engage in business to enter into a form of

contract which might provide for any form of restraint of interstate commerce, the will of Congress as expressed in the Anti-Trust laws could be nullified. This is not the law and private contracts can not be resorted to for that purpose. *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211.

The matters set up in the special defense not being sufficient for the reasons herein set forth, the demurrer thereto is sustained.

OCTOBER 9, 1930.

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